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No. 91-1644

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

SHERRIE VIRE, ETC., ET AL., PETITIONERS

v.

SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in view of petitioners' pending state court action involving the same vaccine-related injury, the Claims Court should have dismissed petitioners' petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 *et seq.*

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. A15-A26), the Claims Court (Pet. App. A7-A14), and the special master (Pet. App. A1-A6) are unreported. The judgment of the court of appeals is noted at 945 F.2d 733 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1992. The petition for a writ of certiorari was filed on April 13, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Childhood Vaccine Injury Act of 1986 (hereinafter the Vaccine Act or Act), 42 U.S.C. 300aa-1 *et seq.*, establishes a National Vaccine Injury Compensation Program (the Program), administered by the Secretary of Health and Human Services (HHS), to provide compensation to persons who suffer certain vaccine-related injuries. Section 300aa-10(a). The Act requires persons suffering injuries from a covered vaccine that was administered after its enactment to seek compensation through the Program before suing a vaccine manufacturer or administrator. Section 300aa-11(a)(2)(A).

The Act also permits persons whose vaccine-related injuries predate the legislation's enactment to petition for compensation under the Program in certain instances. Persons who had previously been denied compensation in a civil action against a vaccine administrator or manufacturer that was concluded before the effective date of the compensation Program may petition for compensation under the Program. 42 U.S.C. 300aa-11(a)(4). Also, within certain time limits, persons who had civil actions pending on the effective date of the Program could dismiss their actions and file a petition for compensation under the Program. Section 300aa-11(a)(5). However, participation in the Program is not available to any person who "brings a civil action after November 15, 1988 for damages for a vaccine-related

injury or death associated with the administration of a vaccine before November 15, 1988." Section 300aa-11(a)(6).[1]

A person initiates a proceeding for compensation by filing a petition with the United States Claims Court, and serving it on the Secretary. Section 300aa-11(a)(1). A special master conducts an informal proceeding to determine whether compensation is warranted and the amount of such compensation. Section 300aa-12(d)(1) and (3). The special master's decision is reviewable by the Claims Court. Section 300aa-12(e). The Court of Appeals for the Federal Circuit has jurisdiction to review the findings of fact and conclusions of law of the Claims Court if an appeal is filed within 60 days of judgment. Section 300aa-12(f).

2. Petitioners are the surviving parents of Cassaundra Vire who, on December 28, 1987, at approximately six months of age, received her third diphtheria-pertussis-tetanus (DPT) inoculation at a county health department clinic in Oklahoma. The following day, December 29, 1987, Cassaundra was found dead in her crib. Pet. App. A2.

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[1] Section 300aa-11(a)(6) as originally enacted prohibited anyone who brought a civil action after the effective date of the Vaccine Act (October 1, 1988) from obtaining an award of compensation under the Program. After learning that the Claims Court did not begin accepting petitions for compensation until November 15, 1988, Congress amended Section 300aa-11(a)(6) to make that the operative date of the provision, on the theory that persons filing civil actions before the Claims Court began accepting petitions under the Program "did not * * * have a true choice" between entering the statutory compensation Program and seeking recovery through the courts. H.R. Rep. No. 247, 101st Cong., 1st Sess. 509, 511 (1989).

On December 27, 1988, petitioner Sherrie Vire, as personal representative of her daughter's estate, presented to the State of Oklahoma an administrative claim for damages arising out of Cassaundra's death pursuant to the Oklahoma Governmental Tort Claims Act (Tort Claims Act), Okla. Stat. Ann. tit. 51, § 151 *et seq.* (West 1988). In September 1989, after the State denied the claim, Mrs. Vire filed a petition for damages in state court under the Tort Claims Act against the State of Oklahoma and the Oklahoma Department of Health. According to petitioners (Pet. 4), no summonses were ever issued or served on the defendants in that action. On December 19, 1989, Mrs. Vire dismissed the tort action against the state defendants without prejudice. *Ibid.*

3. Petitioners then initiated proceedings under the Vaccine Act on January 25, 1990. Pet. App. A2. The Secretary filed a report denying that petitioners were entitled to compensation. At a status conference on September 25, 1990, the special master *sua sponte* noted a possible defect in the Claims Court's jurisdiction in view of petitioners' admission that a prior civil action had been filed in September 1989 against the State of Oklahoma involving the same alleged vaccine-related injuries. *Id.* at A3-A4.

Following briefing by both sides, the special master issued an order of dismissal on December 28, 1990. Pet. App. A1. The special master rejected petitioners' argument that, since the defendants in the prior state court action were never served with process, Mrs. Vire did not actually "bring" a civil action within the meaning of Section 300aa-11(a)(6). The Master explained that "the generally accepted rule is that 'commence an action' and 'bring an action' mean the same thing." Pet. App. A5. The special master con-

cluded that "[b]y filing a civil action seeking compensation for Cassaundra's death after November 15, 1988, Sherrie Vire made an election of remedies which precludes her from pursuing the instant claim." *Id.* at A6.

4. Petitioners filed a motion for review of the special master's order in the Claims Court. During oral argument in the Claims Court, petitioners' counsel revealed that, following the special master's decision, he had refiled Sherrie Vire's action against the State of Oklahoma and had effected valid service of process against the defendants. Pet. App. A12. In light of those developments, the Claims Court held that "under 42 U.S.C. § 300aa-11(a)(6), the refiling of the prior suit under the Oklahoma Tort Claims Act, which suit is still pending, has effectively divested this court of any jurisdiction it may have had to adjudicate petitioner's claim." *Id.* at A13. The court also considered petitioners' other arguments, see *id.* at A10-A11,[2] "and for the reasons assigned by [the Secretary,] f[ound] them without merit." *Id.* at A13. Accordingly, the decision of the special master was affirmed by the court. *Id.* at A14.

5. The court of appeals affirmed in an unpublished per curiam judgment pursuant to the local rules of the court. See Fed. Cir. R. 36.

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[2] Petitioners had argued, *inter alia*, that dismissal of their petition for compensation under 42 U.S.C. 300aa-11(a)(6) (1988 & Supp. I 1989) deprived them of the right to due process and the equal protection of the laws; that they had not "brought" a civil action within the meaning of the Section; and that any objection based on that Section was not jurisdictional and was therefore waived by the Secretary's failure to raise it in the answer to the petition for compensation.

ARGUMENT

The court of appeals' summary affirmance of the Claims Court's decision, which lacks precedential effect within the only circuit having jurisdiction over Vaccine Act claims, is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Section 300aa-11(a)(6) of the Vaccine Act bars from participation in the compensation Program any "person [who] brings a civil action *after November 15, 1988* for damages for a vaccine-related injury or death associated with the administration of a vaccine *before November 15, 1988*." 42 U.S.C. 300aa-11 (a)(6) (Supp. I 1989) (emphasis added). Cassaundra Vire received her third DPT inoculation on December 28, 1987, and died the next day. Petitioners admit that they filed suit seeking compensation against the vaccine administrator on September 25, 1989—long after the Program became effective. Pet. 4. Moreover, they concede that their action against the vaccine administrator—involving the same inoculation that is the subject of the instant proceedings—has been refiled and is now pending in a state court. Pet. 6. Under these circumstances, petitioners are barred by the clear terms of Section 300aa-11(a)(6) from seeking compensation under the Program. Thus, the court of appeals was correct to affirm the Claims Court's holding that the actions filed by petitioners in state court divested it of "any jurisdiction it may have had to adjudicate petitioners' claim" under the compensation Program. Pet. App. A13.[3]

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[3] Petitioners also argue (Pet. 9-15) that the special master erred in concluding that they had made an "election of remedies" by initiating a civil action in state court in 1989. Petitioners rely exclusively on cases concerning the common law

2. Petitioners renew their contention, raised in the courts below, that the compensation petition at issue is not barred because Mrs. Vire did not "bring a civil action" within the meaning of Section 300aa-11(a)(6). Petitioners observe that, although the September 1989 action was filed in state court, summonses were never served on the defendants.

Contrary to petitioners' assertion, petitioners succeeded in "bring[ing] an action" in Oklahoma state court in September 1989. This phrase has a settled meaning at law, and refers to the initiation of legal proceedings by filing a complaint. See *Black's Law Dictionary* 174 (5th ed. 1979); see also, *e.g.*, *Blumenthal* v. *G-K-G, Inc.*, 737 F. Supp. 493, 494 (N.D. Ill. 1990) (to "bring an action" refers to the initiation of legal proceedings by the filing of a complaint); *American Casualty Co.* v. *FSLIC*, 683 F. Supp. 1183, 1185 (S.D. Ohio 1988) (same). Cf. Fed. R. Civ. P. 3 (providing that "[a] civil action is commenced by filing a complaint with the court.")[4] Nothing in the

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doctrine of election of remedies, which are inapplicable here. The Vaccine Act governs the relief available to petitioners, and the question whether petitioners' compensation claim is barred is strictly a matter of statutory construction. See *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989).

[4] Petitioners rely (Pet. 16-18) on cases interpreting 28 U.S.C. 1404(a), which provides that "a district court may transfer any civil action to any other district or division where it might have been brought." See *Foster-Milburn Co.* v. *Knight*, 181 F.2d 949 (2d Cir. 1950); *Schacht* v. *Javits*, 53 F.R.D. 321 (S.D. N.Y. 1971); *Twentieth Century-Fox Film Corp.* v. *Taylor*, 239 F. Supp. 913 (S.D. N.Y. 1965). The courts in those cases held that a district in which the defendant is not amenable to process is not one in which an action "might have been brought" under Section 1404(a). Those

language of Section 300aa-11(a)(6) justifies deviating from the customary meaning by adding the requirement that a summons be served on the defendant. In any event, petitioners concede that the state defendants were properly served when petitioners refiled their lawsuit against the vaccine administrator following the special master's dismissal of their compensation claim. Thus, even if petitioners' reading of Section 300aa-11(a)(6) were correct, their petition for compensation should still have been dismissed under that Section.[5]

3. Petitioners also claim (Pet. 30-33) that, since the Secretary failed to argue in the answer to the petition for compensation that the petition was barred under Section 300aa-11(a)(6), that objection was waived under Fed. R. Civ. P. 12(h). This is so, petitioners contend, because Section 300aa-11(a)(6) is not a jurisdictional requirement. Petitioners rely on the observation (Pet. 31) that the statute grants the Claims Court jurisdiction over the compensation pro-

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courts did not decide—nor does it follow from their decisions—that a plaintiff has "brought an action" within the meaning of the Vaccine Act only if the defendant is actually served.

[5] Petitioners contend (Pet. 25-29) that Section 300aa-11(a)(6) should not be applied to bar their compensation claim because they refiled their civil action against the State of Oklahoma to prevent the running of the state statute of limitations—and the possible loss of any claim for relief—while the decision to dismiss their Vaccine Act claim was on appeal. Because Section 300aa-11(a)(6) is jurisdictional, see pages 8-9, *infra*, the reason for their refiling is irrelevant. In any event, petitioners' filing was unnecessary: Under Section 300aa-16(c) of the Vaccine Act, the state statute of limitations is tolled by the filing of a claim for compensation under the Program. See also *Greider* v. *Secretary of HHS*, 23 Cl. Ct. 348, 351 & n.5 (1991).

gram in a separate Section (see 42 U.S.C. 300aa-12(a) (1988 & Supp. I 1989)): therefore, they argue, Section 300aa-11(a)(6) must have nothing to do with jurisdiction.

Petitioners are wrong. This Court has stated that "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). See also *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."). The Vaccine Act waives the sovereign immunity of the United States by permitting suits for compensation for vaccine-related injury under circumstances defined in the Act. Section 300aa-11(a)(6) operates as a limitation on the waiver of sovereign immunity by denying the government's consent to be sued when a civil action has been filed after November 15, 1988, based on a claim arising before that date. Section 300aa-11(a)(6) thus deprives the court of jurisdiction over petitioners' claim. In this case, the court correctly noted the jurisdictional defect and dismissed the action. See Fed. R. Civ. P. 12(h)(3).

4. Finally, petitioners argue that application of Section 300aa-11(a)(4)-(6) to dismiss this claim violates their constitutional rights to equal protection and due process of law. Pet. 37-38.

Petitioners' equal protection challenge is directed at the Act's compensation scheme. As outlined previously (pages 2-3, *supra*), subparagraphs (4)-(6) of subsection 11(a), 42 U.S.C. 300aa-11(a), describe the situations in which persons who suffered vaccine-related injuries prior to the effective date of the Pro-

gram may be eligible to file a petition for compensation. Individuals who instituted suit before compensation was available under the Act, but did not receive any compensation as part of the resolution of that suit, were allowed to file a petition under the Program. Section 300aa-11(a)(4). Similarly, persons whose pending actions had not yet proceeded to judgment were permitted to dismiss those actions and enter the Compensation Program. Section 300aa-11(a)(5). Finally, persons who were injured before the effective date of the Program, but had not yet sought compensation in any forum, were put on notice that their decision to file suit would preclude them from participation in the Program. Section 300aa-11(a)(6). Thus, in the three situations described in subparagraphs (4)-(6), all persons who suffered vaccine-related injuries before the effective date of the Program and who had not yet collected damages were given one opportunity to petition for compensation, but were precluded from pursuing simultaneously a private suit and a petition for compensation.

Petitioners assert that the compensation scheme is irrational because persons in petitioners' position—those injured before the compensation Program's effective date who filed a civil action after compensation under the Program became available—are "not given the same choice as others injured before the Program's effective date to enter the compensation program in lieu of [a] civil action." Pet. 46. That assertion is untrue. Persons like petitioners were in the position to choose, at the time they filed a civil action, between filing a petition for compensation under the program or seeking judicial relief. In contrast, persons who filed a civil action before Program benefits became available did not

have the opportunity, at the time of filing, to seek compensation under the Program instead of pursuing a civil action; relief was available only through an action in court. Permitting those persons to withdraw a previously filed civil action and seek Program compensation provides them with a choice between two avenues of relief—the same choice that was initially available to petitioners.

Petitioners also argue that the statutory scheme violates their right to due process of law because it forced them either to "forego[] their federal claim for compensation by filing a state court action or risk losing their right to recover against the State of Oklahoma by not strictly complying with state filing deadlines." Pet. 57. This argument is specious in light of the Vaccine Act's provision for the tolling of a state's statute of limitations upon filing of a petition for compensation under the Program. See 42 U.S.C. 300aa-16(c) (1988 & Supp. I 1989); note 5, *supra*. Thus, if petitioners had first filed a petition for compensation under the Program, any claim they might have against the State of Oklahoma would have been preserved under this Section.[6] As it is, petitioners have not been deprived of all opportunity to seek relief, since they now have pending a civil action in state court against the State of Oklahoma which involves the same DPT inoculation that is the subject of the instant proceedings.

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[6] Petitioners' suggestion (Pet. 55-56) that Section 300aa-16(c) is ambiguous with respect to a suit against the state itself is unavailing. The clear language of Section 300aa-16(c) tolls the limitations period for *all* actions arising under state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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